

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 103

		3045952
	BETWEEN	BROCK ARMSTRONG Applicant
	AND	SMARTLIFT SYSTEMS LIMITED Respondent
		3046773
	BETWEEN	GRAEME HAIKA Applicant
	AND	SMARTLIFT SYSTEMS LIMITED Respondent
		3047593
	BETWEEN	SMARTLIFT SYSTEMS LIMITED Applicant
	AND	BROCK ARMSTRONG First Respondent
	AND	GRAEME HAIKA Second Respondent
Member of Authority:	Peter van Keulen	
Representatives:	Chrissy Gordon, advocate for Brock Armstrong and Graeme Haika Lynda Mathieson, advocate for Smartlift Systems Limited	
Investigation Meeting:	On the papers	
Submissions Received:	18 December 2019 from the Applicant 13 and 14 January 2020 from the Respondent	
Date of Determination:	3 March 2020	

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**COSTS DETERMINATION OF THE AUTHORITY**

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## **The substantive determination**

[1] In a determination dated 16 October 2019<sup>1</sup>, I determined that:

- (a) Smartlift Systems Limited had unjustifiably dismissed both Mr Haika and Mr Armstrong and I ordered it to pay Mr Haika \$10,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 and Mr Armstrong \$12,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.
- (b) Smartlift had failed to keep a signed copy of Mr Haika's employment agreement and I ordered it to pay a penalty of \$500.00 to the Crown.
- (c) Mr Haika and Mr Armstrong breached the duty of fidelity and ordered them to pay penalties of \$4,000.00 each, to Smartlift.

[2] I reserved costs and set a timetable for submissions on costs if the parties were unable to agree. That timetable was:

- (a) Any party seeking an order for costs was to lodge and serve a memorandum on costs by 30 October 2019.
- (b) The other party was to lodge any memorandum in response within 14 days of receiving the initial memorandum.

## **Application for costs**

[3] On 18 December 2019, the advocate for Mr Armstrong and Mr Haika lodged an application for costs together with an application for leave to lodge the application for costs out of time (the Application for Leave).

[4] The Application for Leave was advanced on the following grounds:

- (a) The parties had attempted to resolve costs but were unsuccessful.
- (b) Smartlift Systems Limited had subsequently filed a challenge to the determination with the Employment Court.

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<sup>1</sup> *Armstrong and Anor v Smartlift Systems Limited* [2019] NZERA 492

- (c) The issue of costs was then overlooked due to this challenge.
- (d) Smartlift has not suffered any disadvantage due to the late lodging of the costs application.

[5] Counsel for Smartlift lodged an opposition to the Application for Leave, stating, amongst other things:

- (a) The parties had not attempted to resolve costs.
- (b) Both representatives had only addressed costs when the Authority enquired about any pending application for costs on 7 November 2019, with Smartlift submitting that costs should lie where they fall and the advocate for Mr Armstrong and Mr Haika indicating an application for costs would be lodged.
- (c) The advocate for Mr Armstrong and Mr Haika then did nothing further about costs until 18 December 2019 when she lodged the Application for Leave – a further five weeks and two days later.
- (d) The challenge filed by Smartlift has no relevance to any application for costs – I note here that the challenge was filed on 13 November 2019, which is 14 days after any application for costs should have been lodged.

### **Analysis**

[6] I have considered the parties' submissions on the Application for Leave and considered the relevant case law<sup>2</sup>. Based on this I make the following observations:

- (a) Whilst the timeframe for lodging an application for costs was relatively short (fourteen days), Mr Armstrong and Mr Haika's application for costs was seven weeks late.
- (b) In the Application for Leave there is no adequate explanation for the initial failure to meet the 30 October 2019 deadline. There is no evidence to support the assertion that the parties had been negotiating costs and Smartlift's challenge to the Employment Court would have had no impact on this deadline.

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<sup>2</sup> *Metalic Sweeping (1998) Limited v Stephen Whitehead* [2010] NZEmpC 23.

- (c) The Application for Leave also fails to adequately explain why, having advised the Authority on 11 November 2019 that Mr Armstrong and Mr Haika would lodge an application for costs, the application was then a further five weeks and two days late. I do not accept the submission that costs were overlooked because of the challenge filed by Smartlift as being an adequate explanation.
- (d) There is no evidence of actual prejudice to Smartlift caused by the delay in lodging the application for costs, however, the issue is actually about Smartlift being entitled to assume no application would be made given the time that had lapsed and acting on this.<sup>3</sup> Given the lengthy delay here, Smartlift was entitled to make this assumption and act accordingly.

[7] Overall I find the delay of seven weeks to be significant and that it was open to Smartlift to assume an application would not be made and act on this. I also find the explanation for the delay to be inadequate. In all of the circumstances the delay cannot be excused and the time limit extended; in the words of the Employment Court “(w)hile the Authority or the Court have the jurisdiction to extend time, time limits should not be allowed to run on indefinitely”<sup>4</sup>.

[8] I will not exercise my discretion and allow the application for costs to be lodged outside of the timeframe set by me and accordingly I will not award costs in this matter.

Peter van Keulen  
Member of the Employment Relations Authority

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<sup>3</sup> Applying the rational expressed by the Employment Court in *Metallic Sweeping*.

<sup>4</sup> *Metallic Sweeping* at [26].